No. 90-5721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PERVIS TYRONE PAYNE,
Petitioner,

v.

TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Court, having twice decided in the last five years that the use of unforeseeable victim impact information in a capital sentencing trial violates the Eighth Amendment, should now overrule its previous decisions?

2. Whether Petitioner's death sentence should be vacated because of the State's use of information of the type condemned in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)?

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OPINION OF THE COURT BELOW

Tennessee v. Payne, 791 S.W.2d 10 (1990).

STATEMENT OF JURISDICTION

The judgment of the Tennessee Supreme Court was entered on April 16, 1990. Petitioner filed a Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee on September 12, 1990. The Petition for Writ of Certiorari was granted February 15, 1991. The Court subsequently entered an amended order on February 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

United States Constitution:

Eighth Amendment

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Constitution:

Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Pervis Payne, a twenty year old mentally handicapped black man with no previous criminal record, was convicted of the first degree murder of Charisse A. Christopher, a twenty-eight year old white woman, and her two year old daughter, Lacie Jo Christopher. He was also convicted of assaulting Charisse Christopher's three year old son, Nicholas, with intent to commit murder in the first degree. Following a separate penalty trial, Payne was sentenced by the jury to die.

During the guilt phase, the prosecution presented evidence from which the jury could conclude that Payne had committed the attacks while under the influence of cocaine.

Payne denied committing the crimes. Testifying on his own behalf, Payne admitted being in the victim's apartment shortly before the offense, but denied that he had committed the crimes (T. 1220-29). Payne testified that, on his way to his girlfriend's apartment, located on the same floor as that of the victims, he passed an unidentified black man descending the steps from the victims' apartment (T. 1215-16). Payne further testified that he heard a baby crying inside. (T. 1218). He said that, when he entered the apartment, he found Charisse Christopher with a knife protruding from her throat (T. 1220).

The only proof offered by the prosecution during the sentencing phase consisted of victim impact information of precisely the type that was condemned in *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989), and a color videotape of the crime scene that had not been introduced into evidence during the guilt phase of the trial.

Mary Zvolanek, the mother and grandmother of the victims, responding to a question designed to elicit precisely the type of testimony condemned by *Booth*, testified that the deaths of Nicholas' mother and sister had had a devastating effect upon the young boy:

> Q. Ms. Zvolanek, how has the murder of Nicholas's mother and his sister affected him?
>
> A. He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie. (J.A. 3).

Ms. Zvolanek's emotional testimony, of course, also revealed her own grief.

After next showing the videotape, the State rested. Payne then offered, in mitigation, evidence that he had no prior record; that he had been a hard and diligent worker; and that he regularly attended the church where his father was the minister. (T. 1500, 1568-70). A clin-

ical psychologist testified about Payne's low I.Q. scores, which he considered significant (T. 1520, 1528). He refrained from describing Payne as retarded, pointing out that that term is "not commonly used any more" (T. 1520). He instead characterized Payne as "mentally handicapped" (T. 1531). He also said that Payne was one of the most polite prisoners that he had ever interviewed (T. 1530).

The prosecution completed its initial closing argument with the dramatic insistence that the jury should sentence Payne to death in order to satisfy an anticipated desire by Nicholas for Payne's execution:

> There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.
>
> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer. (J.A. 12).

In its rebuttal to Payne's closing argument, the prosecution described the impact on Nicholas of the loss of his mother and sister:

> . . . And there won't be anybody there—there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby. (J.A. 14).

* * * *

> Mr. Garts wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who loved Charisse Christopher, her mother and daddy who love her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever. (J.A. 15-16).

The prosecutor subsequently alluded to the "exemplary lives" led by the deceased victims:

> Mr. Garts says but [sic] Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, for two years? They lived exemplary lives. (J.A. 17).

Having based its arguments almost entirely on the victim impact information and the videotape, the prosecution concluded with the following remarks:

> Ladies and gentlemen of the jury, this is the last thing I am going to say to you. But I want you to think about this when you go back into your jury room. We have heard a lot about Charisse Christopher, Lacie Jo and Nicholas, and how they were as they appeared before Pervis Payne came into their lives. And this is what he did to them. (J.A. 17).

The prosecutor then approached a large diagram of Nicholas Christopher's body and stabbed a hole through it with the butcher knife that was found at the crime scene. *See Tennessee v. Payne*, 791 S.W.2d 10, 20 (1990) (J.A. 25, 45). The Tennessee Supreme Court, in its opinion affirming Payne's conviction and sentence, condemned this conduct as "improper argument, an improper, un-

professional act and an improper use of exhibits." *Id.* It refused, however, to order a new sentencing trial.

In returning its verdict, the jury reported on the form provided to it: "We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances so listed above" (J.A. 23).[1]

The Tennessee Supreme Court ruled that Ms. Zvolanek's testimony about the effect that Charisse's and Lacie Jo's deaths had had upon Nicholas, while "technically irrelevant," . . . "did not create a constitutionally unacceptable risk or any arbitrary imposition of the death penalty," and thus was harmless error. *Id.* at 17-18. (J.A. 40). The court further ruled that the victim impact arguments made by the State during the sentencing phase were relevant to show Payne's "personal responsibility and moral guilt." *Id.* at 18-19. (J.A. 42).

This case is now before the Court pursuant to the Amended Order of February 19, 1991 granting Payne's petition for certiorari.

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[1] The statute under which Payne was tried, Tenn. Code Ann. § 39-2-203(g) (1987 Supp.), and the instruction given to the jury pursuant to that statute (J.A. 21, 22), specifically required Payne, in order to save his life, to convince the jury that the mitigating evidence outweighed the aggravating circumstances. This statute was subsequently repealed. The new statute, Tenn. Code Ann. § 38-13-204(g)(2)(B), requires that the jury "unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances." Unlike Payne, a defendant tried under this new statute is no longer required, in order to avoid death, to prove that the mitigating evidence outweighs the aggravating circumstances. Tenn. Code Ann. § 39-13-204(g)(2)(B) (1990 Supp.).

SUMMARY OF ARGUMENT

In violation of the Court's decisions in *Booth* and *Gathers*, the State made its case for executing Payne by emphasizing the suffering of the survivors, insisting that the jury impose the death penalty because of the anticipated desire of Nicholas for Payne's execution, and asserting the exemplary lives of the deceased victims. The record in this case demonstrates, without question, that the State's use of this information was part of an overall strategy to gain a decision based on emotion, rather than reasoned judgment. Because Payne's rights under the Eighth and Fourteenth Amendments were violated, his sentence must be vacated unless the Court overrules *Booth* and *Gathers*.

On principles of stare decisis, the Court should not overrule *Booth* and *Gathers*. Deference to stare decisis promotes stability and public confidence in the judiciary and in the authority of constitutional decisions. There has been no time for the Court's decisions in *Booth* and *Gathers* to be tested by experience.

Apart from the absence of exceptional circumstances calling for departure from stare decisis, *Booth* and *Gathers* should not be overruled in any event. They are constitutionally sound decisions that preserve fundamental Eighth Amendment safeguards and follow logically from the Court's prior decisions.

Unforeseeable victim impact information says nothing about a defendant's state of mind, character, or propensity for future dangerousness. It is, therefore, irrelevant to the capital sentencing determination. The Eighth Amendment prohibits the use of such information in capital sentencing determinations because its consideration creates the risk that death will be imposed out of whim, passion, prejudice or mistake.

An examination of the consequences of overruling *Booth* and *Gathers* further demonstrates that these decisions are necessary to preserve the Eighth Amendment's safeguards. The use of unforeseeable victim impact information will convert the sentencer's guided discretion to determine whether the offender's depravity warrants death into an uncontrollable and open-ended invitation to decide whether a particular victim's worth merits executing the offender. At best, the imposition of the death penalty will turn on the victim's perceived character and value to others, with the sentencer in each case becoming society's agent for determining the relative merits of the victims. At worst, it will become a mechanism for implementing social prejudice.

If *Booth* and *Gathers* are overruled, the inevitable tendency in capital sentencing trials will be to push the defendant's state of mind, character, and propensity for future dangerousness into the background, as the focus shifts to the victim's character and worth. This, in turn, will deter the sentencer from making a reasoned moral response to the offender's background, character, and crime.

Though unforeseeable victim impact information is not relevant to prove an offender's state of mind, character, or propensity for future dangerousness, it has been stated that a state may nonetheless use such information in a capital sentencing determination, because (1) by considering unforeseeable victim impact information, the sentencer implements society's legitimate interest in retribution; (2) the law, in other contexts, makes punishment dependent upon the unforeseeable consequences of the offense; and (3) unforeseeable victim impact information is needed to counter mitigating evidence offered by the defendant. These justifications for allowing a state to use such information should be rejected.

The use of unforeseeable victim impact information not only fails to promote, but actually undermines, the penological objective of retribution. When a society invokes retribution to authorize the death penalty, it recognizes that life is so precious that its aggravated taking permits the execution of the responsible offender. Retribution, when invoked in this fashion, recognizes the preciousness of every human life. When, however, retribution is used to make comparative evaluations of the lives of individual victims, then, of necessity, it no longer affirms the preciousness of every life, and it no longer comports with the dignity of men.

That the law, in other contexts, allows punishment to depend upon the unforeseeable consequences of the offender's conduct does not justify the use of such information in capital sentencing trials. Legislatures, in making distinctions among punishments for different types of offenses, often make presumptions that the harm caused by the offense is generally indicative of the actor's intent. In those instances in which legislatures make punishment distinctions based solely on the harm caused by the actor's conduct, they do so on the basis of the harm to society in general, and not on the basis of the harm suffered by individuals in particular.

The use of unforeseeable victim impact information in non-capital cases may often be justified by the information's relevance to restitution. Restitution, of course, plays no role in the determination of whether an offender should live or die. Furthermore, the use of irrelevant information to enhance punishment in non-capital cases very rarely, if ever, violates the Eighth Amendment.

The use of unforeseeable victim impact information in a capital sentencing trial cannot be justified on the grounds that it is relevant to rebut mitigating evidence offered by the defendant. There is no symmetry between the defendant's offer of mitigating circumstances and the prosecution's use of the unforeseeable consequences of the offense. The prosecution may, of course, counter the de-

fendant's mitigating evidence through the cross-examination of defense witnesses, the introduction of its own proof directed toward relevant factors, and the use of appropriate arguments.

Finally, the Tennessee Supreme Court erroneously concluded that the State's use of unforeseeable victim impact information constituted harmless error. Apart from the crimes themselves, which, of course, were brutal and shocking, there was no evidence that supported the imposition of death other than the *Booth*-condemned victim impact information.

At the time of these killings, Payne was a twenty year old mentally handicapped laborer, with no prior record. The State introduced no evidence of any disciplinary problems or academic misconduct. Nor did the State seek to show any clinical evaluation or otherwise attempt to demonstrate any propensity for future dangerousness. The State was thus forced to make its case for execution through the use of *Booth*-violative evidence and arguments and through theatrics purposefully calculated to induce an emotional reaction, rather than a reasoned, moral response.

Payne was required to convince the jury that his mitigating evidence outweighed the aggravating circumstances. The State's heavy reliance on the *Booth*-condemned information made Payne's burden especially onerous. The erroneous use of this information was not harmless beyond a reasonable doubt.

ARGUMENT

I. THE VICTIM IMPACT INFORMATION USED IN THIS CASE IS OF THE TYPE CONDEMNED IN *BOOTH* AND *GATHERS*.

While Justice Powell purported to classify victim impact information into two types, *Booth* at 502, he actually identified three types of information: (1) the personal characteristics of the victims; (2) the emotional impact of the crimes on surviving family members; and (3) the family members' opinions and characterizations of the crimes and of the defendant. *Id.* All three were present here. In addition to referring to the "exemplary lives" led by the deceased victims (J.A. 17), the State emphasized the emotional effect that the crimes have had on the survivors (J.A. 3, 12, 14, 15-16) and dramatically invoked the anticipated desire of Nicholas for Payne's execution as a reason for imposing the death penalty (J.A. 12).

Other than the police officer who authenticated the videotape, the only witness called by the prosecution was Mary Zvolanek, the mother and grandmother of the victims. Her emotional testimony that Nicholas "cries for his mother" and "misses my Lacie" fits precisely within the second type of information condemned in *Booth*. This live testimony, while certainly not as lengthy as the written statement in *Booth*, was every bit as devastating. That the prosecution appreciated the tendency of this testimony to arouse the passions of the jury is underscored by the heavy emphasis it placed on Ms. Zvolanek's testimony both during the opening statement of the sentencing trial, when the prosecution promised the jury it would hear Ms. Zvolanek describe the impact on Nicholas (J.A. 5), and during its closing arguments (J.A. 12, 15-16). That the formal presentation of this testimony was part of an overall strategy by the prosecution to induce an emotional reaction from the jury, rather than a reasoned moral response to the evidence, is further borne out by

the prosecution's introduction of the gruesome color videotape (T. 1505-07) during the sentencing phase [2] and its improper stabbing of the exhibit at the close of the rebuttal argument. *See Tennessee v. Payne*, 791 S.W.2d at 20 (J.A. 45).

It is, of course, foreseeable to a murderer that, when he knowingly leaves a surviving small child, the child will miss and long for his dead parent. This knowledge is relevant to show moral blameworthiness. As Justice Powell wrote, "a defendant's degree of knowledge of the probable consequences of his actions may increase his

[2] The tape showed the crime scene, including the bodies of the two dead victims. Charisse's hands and face revealed the effects of *rigor mortis*, and the tape focused on these particular features for several seconds at a time, sometimes with "close-ups." The prosecution's dramatic reference to the tape in closing argument sought to connect the victim's features, as depicted in the film, with the "depravity" of the conduct:

> Now the first two minutes of the videotape wasn't just shown because its in color and looks a whole lot more gory. It's because it shows more detail and more accurately what we're talking about in the first stage of the trial. And while, perhaps I couldn't refer to it in voir dire, you remember when I asked you in voir dire could you listen to that kind of proof, that you were going to hear some rather graphic evidence of wounds. Well, that's what I was talking about.
>
> You see, because that's not something I want to spring on somebody without warning them on the front end, even though it was a week ago. Because it shows very graphically how atrocious this crime was, how cruel it was, and how much depravity it showed. Some of the details especially in that picture—in that videotape, you can't see as well as [sic] in the black and white picture. For instance, Charisse's right hand all gnarled up in agony. And Lacie Jo's hand and Lacie Jo's eyes and the expression on her face some people refer to as the thousand yard stare because it's just sort of not focused (J.A. 7-8).

No foundation had been laid, of course, for the argument that Charisse's "gnarled" hand reflected her "agony" at death or that the expression on the child's face was relevant to show the nature of the killing.

moral culpability in a constitutionally significant manner." *Booth v. Maryland*, 482 U.S. at 505. In the case at bar, therefore, the prosecution could have argued to the jury that the perpetrator likely knew that, if by chance a child survived the attack, he or she would long for his or her mother or sibling.

The fact that the prosecution could have made this argument does not justify its formal presentation of Ms. Zvolanek's testimony in blatant violation of *Booth*. Her live emotional testimony that Nicholas did in fact cry for his mother, that he repeatedly asked for "my Lacie", and that he asked his grandmother if she "also missed Lacie" is markedly different from the prosecutor's merely drawing a general inference during an argument. It is evidence designed to evoke a response based on what actually happened to Nicholas, rather than on what the perpetrator might have foreseen as the effect of his attack. Absent this evidence, the jury's focus would be properly limited to an assessment of the probable consequences of the crimes from the same vantage point as the perpetrator. "[T]he formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Booth v. Maryland*, 482 U.S. at 508.

Furthermore, the emotional trauma to the grandparents, revealed through Ms. Zvolanek's testimony and invoked by the prosecution in both its initial closing (J.A. 12) and rebuttal (J.A. 15-16) arguments, was offered solely to show the effect of the crimes on the survivors. It certainly had no bearing on the defendant's state of mind or character.

Equally, if not more, prejudicial was the prosecution's dramatic conclusion to its initial closing argument (J.A. 12). The prosecution insisted that the jury should impose the death penalty because nothing else will satisfy

Nicholas' wishes as he matures and comes to appreciate what has happened.

A survivor's opinion on whether the offender should be executed was condemned not only by the majority in *Booth*, *id.* at 508, but also, perhaps, by the dissent, *id.* at 518-19 (White, J., dissenting) (pointing out that, even if inappropriate to allow victim's family to express such opinions, this is no reason to declare admission of victim impact information *per se* unconstitutional). The prosecution's argument in this case goes even beyond a survivor's expression of the opinion that the defendant should be executed. The prosecution not only took it upon itself to assure the jury that Nicholas would want Payne executed, but also indicated that Nicholas would be greatly disappointed if the jury reached a different conclusion. There is, of course, no support in the record for the prosecution's assumption. More significantly, even if it is assumed that Nicholas will want Payne executed, asking a jury to impose death for that reason is condemned by the majority opinion in *Booth*, *id.* at 508-09, and, as just noted, perhaps by the dissenting opinion as well. *Id.* at 518-19.

The prosecution's appeal took from the jury the awesome decision making responsibility that it, and it alone, is supposed to exercise. The prosecution's insistence that the jury impose death not because the evidence mandated that decision, but because of the anticipated desire of Nicholas for Payne's execution, was a form of psychological intimidation expressly calculated to make the jurors feel that they would be letting Nicholas down if they did not impose death. This insistence was, therefore, "clearly inconsistent with the reasoned decisionmaking [the Court] require[s] in capital cases." *Id.* at 508-09.

The use of opinion victim impact information makes a capital sentence dependent on how eloquently the victim's survivors can plead for the offender's death. The

prosecution here undoubtedly chose to make this dramatic appeal because it knew that there could be no more eloquent advocate of death than a three year old child who has himself been attacked by the defendant. The fact that the appeal was made through the voice of the State's representative only served to give it added weight.

It is no coincidence that both this dramatic appeal and the subsequent stabbing of the exhibit occurred at the conclusions of the prosecution's arguments. The prosecution's strategy was to gain a decision based on emotion, rather than one based on a reasoned, moral judgment.

The conclusion is inescapable that the victim impact information used in this case is of the type condemned in *Booth* and *Gathers*. *Payne's* sentence must, therefore, be reversed, unless the Court now overrules *Booth* and *Gathers*.[3]

II. ON PRINCIPLES OF STARE DECISIS, THE COURT SHOULD DECLINE TO OVERRULE *BOOTH* AND *GATHERS*.

Four years ago, in a 5-4 decision, the Court decided *Booth v. Maryland*, 482 U.S. 496 (1987), holding that the Eighth Amendment prohibits a state from using unforeseeable victim impact information in a capital sentencing proceeding. Less than two years ago, in *South Carolina v. Gathers*, 490 U.S. 805 (1989), the Court refused to overrule *Booth* and made it clear that *Booth's* prohibition applied even when the only victim impact information used by the prosecution consists of information designed to show the character of the victim. Since

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[3] The Court would, in fact, have to overrule *Booth* in its entirety in order to affirm Payne's death sentence. Because each of the three types of victim impact information is present here, Payne's sentence must be vacated even if the Court decides to leave intact only that part of *Booth* that condemns the use of opinions on whether the offender should be executed. *See Booth v. Maryland*, 482 U.S. at 508-09. This point is more fully addressed *supra* at pages 28-29.

the decision in *Gathers*, nothing has occurred that diminishes the authority or reasoning of either *Booth* or *Gathers*.

"The rule of law depends in large part on adherence to the doctrine of *stare decisis*." *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 478 (1987) (opinion of Justice Powell, for himself, Chief Justice Rehnquist, Justice White, and Justice O'Connor). As Justice Cardozo wrote, "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, *The Nature of the Judicial Process* 149 (1921), quoted in *Runyon v. McCrary*, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring).

Conscientious adherence to the doctrine is often signified by an individual Justice's willingness to suppress his or her personal preferences in deference to a commitment to the rule of law. *See, e.g., Orozco v. Texas*, 394 U.S. 324, 327-28 (1969) (Harlan, J., concurring). While the doctrine is of greatest force when the Court construes legislation, see *Smith v. Allwright*, 321 U.S. 649, 665 (1944), it is also applicable to matters of constitutional interpretation. As the Court has recently observed, "[a]lthough adherence to precedent is not rigidly required in constitutional cases, *any* departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (emphasis added).

Deference to precedent promotes stability and public confidence in the judiciary and in the authority of constitutional decisions. The public correctly relies on its perception that this is a nation governed by law rather than the views of the individual Justices. While certainly a Justice must vote to overrule a decision that in his or her view conflicts with the Constitution, see *South Carolina v. Gathers*, 490 U.S. at 824-25 (Scalia, J., dissenting), the interests in stability and public confidence require that there be a high and perhaps atypical degree of certainty in the Justice's conviction before he or she votes to abandon a previous decision.

The doctrine of stare decisis recognizes the danger that, if a new generation of Justices "corrects" the errors of its predecessors, the Court might move farther and farther away from the fundamental principles that allow it to implement the rule of law rather than the "mere exercise of judicial will, with arbitrary and unpredictable results." *Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 786-87 (1986) (White, J., dissenting); *Appeal of Portsmouth Savings Bank Corporators*, 525 A.2d 671, 701 (N.H. 1987) (Souter, J., dissenting). To be meaningful, therefore, the doctrine should be followed by an individual Justice even when it requires adopting a position that is contrary to the one he or she would have otherwise adopted on an open question.

The issues addressed in *Booth* and *Gathers* deal with matters that can, and should, be evaluated in the light of experience. Admittedly, experience with the consequences of some decisions sheds little light upon their wisdom. *Cf. Thornburg v. American College of Obstetricians & Gynecologists*, 476 U.S. at 786-88 (1986) (White, J., dissenting). *Booth* and *Gathers*, however, are not such cases. A few years' experience with these decisions should provide the bar and this Court with a realistic assessment of the consequences of prohibiting the use of unforeseeable victim impact information. To date, however, there has been no time for these decisions to be "duly tested by experience." *See* B. Cardozo, *supra*. To overrule these decisions at this time would serve no purpose but to block the opportunity for enlightment.

It has been suggested that a precedent should be overruled when experience demonstrates that it has spawned an "unworkable scheme" that has resulted in "a major

distortion in the Court's constitutional jurisprudence." *Thornburg v. American College of Obstetricians & Gynecologists*, 476 U.S. at 814 (O'Connor, J., dissenting). Such a distortion might occur, for example, when the initial decision leads to subsequent decisions that contravene settled principles of justiciability and procedural fairness. *Id.* at 815. There has, however, been no claim that *Booth* and *Gathers* have created such distortions. These decisions involve the limited application of constitutional principles to a particular segment of criminal sentencing. This is not to suggest, of course, that *Booth* and *Gathers* are not very important decisions, but only to point out that, in terms of whether to depart from stare decisis, they are distinguishable from cases having a wider impact.

Stare decisis is an integral part of constitutional jurisprudence. It is a doctrine from which the Court should depart only when exceptional justifications exist. We respectfully submit that those justifications do not exist here.

III. THE COURT'S RULINGS IN *BOOTH* AND *GATHERS* ARE NECESSARY TO PRESERVE FUNDAMENTAL EIGHTH AMENDMENT SAFEGUARDS.

This section is divided into two sub-sections. We first explain that *Booth* and *Gathers* follow logically from the Court's earlier decisions. In the second sub-section, we examine the consequences of overruling *Booth* and *Gathers* and explain that these adverse consequences illustrate why these decisions are necessary to preserve the Eighth Amendment's safeguards.

A. *Booth* and *Gathers* follow logically from the Court's earlier decisions.

The Eighth Amendment, like all constitutional provisions, must be construed in a way that implements the principles that it embraces. Though there is a difference

of opinion about the framers' original intent,[4] it is now settled that the Eighth Amendment protects American citizens from a punishment that is disproportionate to the crime of which he is convicted. *Weems v. United States*, 217 U.S. 349 (1910); *Enmund v. Florida*, 458 U.S. 782, 788 (1982). It is also settled that the Eighth Amendment requires an individualized sentencing determination in a capital case, because, otherwise, there would be a constitutionally unacceptable risk that death will be imposed in spite of factors that may call for a less severe punishment. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

In this constitutionally mandated individualized sentencing determination, the sentencer must consider those, and only those, factors that bear on whether the punishment is appropriate for the offender's blameworthiness. A process that either withholds from the sentencer's consideration relevant evidence, see, e.g., *Eddings v. Oklahoma*, 455 U.S. 104 (1982), or allows the sentencer to consider factors that are prejudicially irrelevant to that determination, see, e.g., *Caldwell v. Mississippi*, 472 U.S. 320 (1985), necessarily runs afoul of the Eighth Amendment.

The Eighth Amendment's individualized sentencing requirement is thus concerned with the "process" by which sentences are determined in capital cases. *Eddings*

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[4] *Compare* the dissent of Justice White, with whom Justice Holmes joined, in *Weems v. United States*, 217 U.S. 349, 393-95 (1910) (finding no historical support for the conclusion that the framers intended a constitutional prohibition against disproportionate punishments) *with* Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United Excessive Punishment Doctrine*, 24 Buffalo L. Rev. 783, 806-30 (1975) (arguing that Jefferson, Madison, and others responsible not only for the drafting of the Bill of Rights but prior state legislation as well were influenced by Cesare Beccaria's 1764 treatise, *On Crimes and Punishments*, in which he advocated proportional punishments along with other criminal law reforms).

v. Oklahoma, 455 U.S. at 118 (O'Connor, J., concurring). Insufficiently guided discretion produces the constitutionally unacceptable risk that punishment might be "imposed out of whim, passion, prejudice or mistake," *id.*, or that the sentence will not "reflect a reasoned *moral* response to the defendant's background, character and crime rather than mere sympathy or emotion." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis original).

Booth and *Gathers* follow logically from these settled principles. Unforeseeable victim impact information is irrelevant to the sentencing determination. Such information tells the sentencer absolutely nothing about the offender's state of mind, character, or propensity for future dangerousness. It is, therefore, "wholly unrelated to the blameworthiness" of the defendant. *Booth v. Maryland*, 482 U.S. at 504.

Allowing the sentencer to consider such information "could result in imposing the death penalty because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill." *Id.* at 505. This, in turn, could "divert the jury's attention away from the defendant's background and record, and the circumstances of the crime." *Id.*

Booth also recognizes that the use of unforeseeable victim impact information might create arbitrary distinctions between those cases in which death is, and is not, imposed. *Id.* at 505-06. Such arbitrary distinctions have, of course, been a principal concern of the Court since its decision in *Furman v. Georgia*, 408 U.S. 238 (1972). *See id.* at 312-13 (White, J., concurring).

After pointing out that in some cases the victim may "not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe," *Booth* at 505, the Court said that "the fact that the imposition of the death sentence may turn on such distinctions illustrates the

danger of allowing juries to consider this information." *Id.* Similarly, the Court stated that there is no justification for allowing a capital sentencing "decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." *Id.* at 506. Citing the Court's earlier decision in *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (opinion of Stewart, J.), Justice Powell wrote that information concerning the worth of the victim "does not provide a 'principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not.'" *Id.* The use of such information, in other words, does not provide a basis of distinction that serves any legitimate "end of punishment in the criminal justice system." *Cf. Furman v. Georgia*, 408 U.S. at 311 (White, J., concurring).

B. A more detailed examination of the consequences of overruling *Booth* and *Gathers* further demonstrates that these decisions are necessary to preserve the Eighth Amendment's safeguards against disproportionate punishment and arbitrary classifications.

Unforeseeable victim impact information, as previously noted, will provide no assistance whatsoever to the assessment of the offender's state of mind, character, or propensity for future dangerousness. A murder is no less heinous, and the offender no less deserving of punishment, simply because the victim happens to be a derelict or a hermit who dies without survivors rather than, say, a beloved parent.

That a victim led an exemplary life, or is missed by her survivors, is no more relevant to the defendant's blameworthiness than evidence of the victim's moral shortcomings. Let us say, for example, that a priest is brutally murdered by a man who, while in the process of robbing the parish safe, is surprised by the priest. Let us further postulate that the defendant's attorney, in the

course of his investigation of the case, turns up two young children who will testify that the priest, on several occasions, persuaded them to engage in sexual acts with him.

Ignoring for the moment the lack of wisdom attendant to such a tactic, the defense's attempted introduction of the evidence of the victim's transgressions should be irrelevant, since those past transgressions do not aid the assessment of the defendant's moral culpability.[5] Yet, if *Booth* and *Gathers* are overruled, unfavorable. as well as favorable, information about the victim could be used during the sentencing trial, with the concomitant increased likelihood that the sentencer will be diverted from its evaluation of the offender's blameworthiness.

In addition to providing no assistance to the evaluation of the offender's state of mind, character, or propensity for future dangerousness, the use of unforeseeable victim impact information will convert the sentencer's guided discretion to determine whether the offender's depravity warrants death into an uncontrollable and open-ended invitation to decide whether a particular victim's value to society and/or his survivors merits executing the offender. This, in turn, could well result in the imposition of the death penalty on the basis of the sentencer's assessment of such constitutionally impermissible factors as the victim's race, religion, gender, and economic or social status.[6]

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[5] *See State v. Gaskins*, 284 S.C. 105, 128, 326 S.E.2d 132, 145, *cert. denied*, 471 U.S. 1120 (1985) (no error in excluding confession of victim, a death-sentenced murderer, proffered by defense since victim's status "did not entitle [defendant] to kill him"); *State v. Oliver*, No. 49613 (page 8) (Ohio Ct. App. Oct. 17, 1985) (LEXIS, states library, Ohio file) (state's evidence that the victim was a nice and intelligent person and defense evidence of victim's homosexual acts both held inadmissible); *Henderson v. State*, 234 Ga. 827, 828, 218 S.E.2d 612, 614 (1975) (in general, evidence of deceased's character is inadmissible in a murder trial).

[6] Sentencing determinations may not be based on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example, the race, religion, or political

At best, the imposition of the death penalty would turn on the victim's perceived character and value to others, with the sentencer in each case becoming society's agent for determining the relative merits of the victims. At worst, the death penalty would become a mechanism for implementing social prejudice.

The consequences of overruling *Booth* and *Gathers* will be grim indeed. The tendency will be to push the defendant's state of mind, character, and propensity for future dangerousness into the background, as the focus shifts to the victim's character and worth. The prosecution will present the victim in a manner that appeals to the parochial perspective of the jury, and the defense will often find irresistible the opportunity to attack the victim's character. As this case vividly illustrates, the use of *Booth*-condemned information can be an essential part of

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affiliation of the defendant." *Zant v. Stephens*, 462 U.S. 862, 885 (1983); *Booth v. Maryland*, 482 U.S. at 517 (White, J., dissenting) ("It is no doubt true that the State may not encourage the sentencer to rely on a factor such as the victim's race in determining whether the death penalty is appropriate").

The reality, unfortunately, is that already there is disturbing evidence that the chance that the death penalty will be imposed is significantly greater in cases in which the victims are white then in those in which the victims are black. *See, e.g.*, the "Baldus study," the findings of which, concededly, were neither accepted nor rejected by the Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987). If prosecutorial discretion to seek the death penalty is in fact influenced by the race of the victim, see *id.* at 286-87 (discussing "Baldus study"), then this tendency is likely to be exacerbated if the prosecutor believes that the strength of his case depends upon his ability to marshall effective evidence of the victim's worth or standing in the community.

In *Turner v. Murray*, 476 U.S. 28, 36 (1986), the Court held that the risk of racial prejudice infecting the sentencing decision in a case involving a white victim and black defendant was sufficient to require voir dire examination of jurors about their racial attitudes. This recognized risk of racial prejudice could, of course, also surface when the sentencer is expressly urged to consider the status and worth of the victim.

the prosecution's strategy to gain a death sentence based on emotion rather than on "a reasoned *moral* response to the defendant's background, character, and crime. . . ." *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis original). Furthermore, in its most extreme form, the capital sentencing trial will be a forum for pandering, be it subtle or flagrant, to the most insidious social prejudices.

IV. THE JUSTIFICATIONS ADVANCED FOR OVERRULING *BOOTH* AND *GATHERS* SHOULD BE REJECTED.

It is, we believe, self-evident that unforeseeable victim impact information is not relevant to show an offender's state of mind, character, or propensity for future dangerousness. Those who dissented in *Booth* and *Gathers* have nevertheless indicated that the use of such information may be constitutionally permissible because:

(1) The unforeseeable consequences of an offense comprise part of the offender's "blameworthiness," *Booth v. Maryland*, 482 U.S. at 515-16 (White, J., dissenting); *id.* at 519 (Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 817-18 (O'Connor, J., dissenting); and, by considering unforeseeable victim impact information in this fashion, the sentencer implements society's legitimate interest in retribution, *Booth v. Maryland*, 482 U.S. at 515 (White, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 819-20 (O'Connor, J., dissenting);

(2) The law, in other contexts, makes punishment dependent upon the unforeseeable consequences of the offense, *Booth v. Maryland*, 482 U.S. at 516-17 (White, J., dissenting); *id.* at 519-20 (Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 819 (O'Connor, J., dissenting); and

(3) Such information is needed to counter mitigating evidence offered by the defendant, *Booth v. Maryland*, 482 U.S. at 518 (White, J., dissenting); *id.* at 520

(Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 820-21 (O'Connor, J., dissenting).

In the next three subsections, we explain that these proffered justifications for permitting a state to use unforeseeable victim impact information should be rejected.

A. Victim impact information of the type challenged here not only fails to promote, but actually undermines, the penological objective of retribution.

Retribution is a valid penological basis for authorizing the imposition of the death penalty in certain types of homicide. *South Carolina v. Gathers*, 490 U.S. at 818 (O'Connor, J., dissenting). "'[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.'" *Booth v. Maryland*, 482 U.S. at 515 (White, J., dissenting), quoting *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.).

A legislature invokes retribution by declaring that the execution of the offender is a permissible, though not mandatory, response to the commission of certain classes of offenses (i.e., homicides with one or more aggravating factors present). In any given case, the sentencer, clothed with the legislative authorization, implements retribution by considering the defendant's state of mind, character, and propensity for future dangerousness and then deciding the appropriate punishment. Consideration of the victim's status, his survivors' grief, or his survivors' opinions on whether the defendant should be executed is in no way essential to the sentencer's implementation of retribution.

Though retribution *can* be implemented without the sentencer's having to consider *Booth*-condemned victim impact information, the question that the Court must

decide is whether a state *may* allow the use of such information in a capital sentencing trial. As explained in section C, immediately *supra*, *Booth*, relying on earlier Eighth Amendment decisions, answers this question in the negative. Stated succinctly, the use of such information prevents the sentencer from making the requisite reasoned moral judgment, *Booth* at 505, and creates an arbitrary classification that affords no principled basis for distinguishing the cases in which the death penalty is, and is not, imposed. *Id.* at 505-06. Retribution thus cannot serve as a license for making distinctions based on the perceived worth of victims. As Justice Powell explained: "We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions." *Booth v. Maryland*, 482 U.S. at 506 n.8 (citation omitted).[7]

Justice Powell's reasoning is essential to preserving the principle, announced in previous decisions, that retribution is consistent with the Eighth Amendment's respect for the "dignity of men," *see Gregg v. Georgia*, 428 U.S. at 183 (opinion of Stewart, Powell, and Stevens, J.J.); *Thompson v. Oklahoma*, 487 U.S. 815, 836 (1988). His analysis recognizes retribution's affirmation of the preciousness of life, without simultaneously allowing retribution to be used to exalt some lives over others.

Though punishing offenders by executing them ordinarily is inconsistent with the Eighth Amendment's respect for the "dignity of men," there are limited instances when society's interest in retribution allows the death penalty. *Gregg v. Georgia*, 428 U.S. at 183 (Stewart,

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[7] In those instances in which the governmental interest justifies special protection for certain classes of persons, legislators have acted explicitly. *E.g.*, 18 U.S.C. § 351 (protecting the lives of members of Congress, Cabinet members, and Supreme Court Justices).

Powell and Stevens, J.J.). In these limited instances, invoking retribution to execute the offender is compatible with the dignity of men. *Id.*; *Thompson v. Oklahoma*, 487 U.S. at 836. What permits retribution to be invoked in this fashion is society's recognition of the preciousness of human life—that is, a recognition that each life is so precious that its aggravated taking permits the execution of the responsible offender. It is this affirmation of the preciousness of all human life that makes retribution-based execution compatible with the dignity of men. If, however, retribution becomes a device for making comparative evaluations of the lives of individual victims, then, of necessity, it no longer affirms the preciousness of all life, and it no longer comports with the dignity of men.

Prohibiting the use of unforeseeable victim impact information in no way prevents the sentencer from serving as the "conscience of the community" or from expressing society's "moral outrage". That function is still performed when the sentencer decides whether death is warranted by evidence of the defendant's state of mind, character, and propensity for future dangerousness. By focusing on whether the offender deserves to die for taking another life, rather than on whether the offender's death is satisfactory compensation for the particular victim's life, the sentencer serves retribution's objective of affirming the preciousness of all life.

The essential lesson of *Booth* and *Gathers* is that the brutal, cold blooded murder of a lonely prostitute is every bit as heinous as the similar killing of a hard working, loving mother. That the Eighth Amendment must accommodate this view of humanity is hardly a bad thing. It will ensure that prosecutors, in their efforts to vindicate society's valid interest in retribution, will appeal to the sentencer's reason by focusing on what the defendant did, why he did it, the manner in which he did it, and the kind of person he is. The prosecutor will be called

upon to assume that the sentencer will regard all life as precious and will believe that the less exalted members of our society are just as entitled to protection and justice as are others.

That the holdings of *Booth* and *Gathers* do not impede prosecutors from vindicating society's interest in retribution warrants further emphasis. The prosecution will always be entitled to introduce during the guilt phase evidence of the victim's characteristics relevant to the issues raised in that proceeding. Furthermore, during the sentencing phase, the prosecution will be permitted to prove the defendant's knowledge of both the victim's characteristics and his survivors and to ask the sentencer to make whatever inferences the record will legitimately support concerning the defendant's awareness of the probable consequences of his offense. *Booth v. Maryland*, 482 U.S. at 505.

While we are convinced of the logic and correctness of our position, it would nonetheless amount to folly on our part if we failed to recognize that some members of the Court may not accept our reasoning. We hasten to observe, therefore, that, even if one assumes *arguendo* that retribution may be invoked to justify the sentencer's consideration of unforeseeable victim impact information, there is still no valid basis for allowing the sentencer to consider the third category of information condemned in *Booth*—namely, opinions and characterizations of the defendant and of the crime.

As this case graphically illustrates, invoking a survivor's demand for the defendant's execution takes from the sentencer the responsibility it, and it alone, must exercise and diverts the sentencer from making a decision that "reflects a reasoned *moral* response to the defendant's background, character and crime rather than mere sympathy or emotion." *California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (emphasis original). The fact that the prosecution concluded its initial

closing argument with this dramatic appeal (J.A. 12) and its rebuttal by stabbing the exhibit, *see Tennessee v. Payne*, 791 S.W.2d at 20 (J.A. 45), was hardly coincidental. The prosecution plainly wanted from the jury an emotional reaction, not a reasoned moral response. Because of the prosecution's psychologically intimidating insistence that the jury not let Nicholas down (J.A. 12), Payne's sentence must be set aside even if the Court leaves intact only that part of *Booth* that condemns the use of opinions and characterizations.

B. That the law, in other contexts, allows punishment to depend upon the unforeseeable consequences of the offender's conduct does not justify the use of unforeseeable victim impact information in capital sentencing trials.

1. *Legislatures, in making distinctions among punishments for different types of offenses, often make presumptions that the harm caused by the offense generally is indicative of the actor's intent. In those instances in which legislatures make punishment distinctions based solely on the harm caused by actor's conduct, they do so on the basis of the harm to society in general, and not on the basis of the harm suffered by individuals in particular.*

The fact that society, in other contexts, sometimes makes punishment dependent upon the unforeseeable consequences of the offense does not justify permitting a state to declare victim impact information relevant to the sentencing determination in a capital case. The distinction made between an attempted and a completed offense is often invoked by those who advance this argument. *See, e.g., Booth v. Maryland*, 482 U.S. at 519 (Scalia, J., dissenting). It is worthwhile, therefore, that we analyze this particular example.

Respectfully, we submit that this position overlooks the utterly unknowable and indiscernible quality of human

intent. Of necessity, the law draws distinctions based upon a trier of fact's conclusions regarding a particular actor's intent. It is inevitable that such conclusions will involve speculation, and the law should not be forced to ignore this. The law may, therefore, reflect an awareness of the varying degrees of certainty with which findings of intent are made. That is, legislatures should have freedom to assign severity of penalties based upon the confidence that may fairly be placed in a finding of intent made by the trier of fact. Legislatures thus must be permitted to draw lines based upon their judgments about the degree of confidence that may be had in a trier of fact's conclusion in any given context.

There is a plausible rational basis for a legislature's assigning to an unsuccessful attempt a penalty that is less severe than that which the legislature assigns to the completed offense. The fact that the offense is completed is often indicative of the actor's intent. In many cases, for example, the unsuccessful perpetrator may have experienced "cold feet" at the last instant or otherwise exhibited some tendency reflecting a lesser state of culpability than that possessed by the successful offender.

To be sure, there will be occasions when, as pointed out in the dissenting opinions in *Booth* and *Gathers*, there is no difference whatsoever between the unsuccessful and the successful perpetrator in terms of their intent. That is to say, there will be instances when the crime is not completed simply because of a fortuitous development over which the defendant had no control.[8] Legislatures, however, do not enact laws for particular cases. They must make distinctions that encompass not the particular case, but rather the whole range of possible criminal circumstances.

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[8] The classic illustration of this is, of course, of course, the cold blooded attempt to execute a victim that fails solely because the perpetrator's gun misfires. *Booth v. Maryland*, 482 U.S. at 519. (Scalia, J., dissenting).

Admittedly, legislatures, in addition to making classifications based on intent, also make distinctions based on the harm caused by the actor's conduct. A reckless driver who runs a stop light and kills someone is punished more severely than one who commits the same offense but, fortuitously, causes no injury. *Booth v. Maryland*, 482 U.S. at 516 (White, J., dissenting); *id.* at 519 (Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 805 (O'Connor, J., dissenting). In basing punishment on the degree of harm in this instance, however, a legislature takes into account only the loss of life in general, and not the worth of the victim in particular. A legislature thus does not make the punishment more severe when the victim is a priest rather than, say, a prostitute.

2. *The use of unforeseeable victim impact information in non-capital cases may often be justified by the information's relevance to restitution. Furthermore, the use of irrelevant information to enhance punishment in non-capital cases seldom, if ever, violates the Eighth Amendment.*

The disallowance of the use of unforeseeable victim impact information in capital sentencing trials should not be viewed as inconsistent with the states' legitimate interest in using such information in non-capital proceedings. To the extent that restitution is or may be required of a defendant in a non-capital case, unforeseeable victim impact information is undisputably relevant to the sentencing decision. Death, however, is in no way, shape or form a means of restitution. It is instead the ultimate penalty exacted for the most grievous of affronts to society. The basis for making unforeseeable victim impact information relevant in a non-capital case is, therefore, absent in a capital proceeding.[9]

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[9] In the view of sentencing judges, victim impact statements are most beneficial, not surprisingly, because of the information they provide on the physical impact of the crime. Hillenbrand & Smith, *Victims Rights Legislation: An Assessment of Its Impact on Crimi-*

There are, of course, instances when victim impact information is used in non-capital cases not to impose restitution, but solely to enhance punishment. Even so, this use of victim impact information will seldom, if ever, violate the Eighth Amendment.

The maximum penalty for non-capital offenses is almost always within the range of proportionate punishment allowed by the Eighth Amendment. It necessarily follows, therefore, that the decision on where to place an offender's sentence within the statutorily permissible range will also not invoke the Eighth Amendment. Even if the non-capital sentencing decision is based on irrelevant evidence, no Eighth Amendment violation will have occurred, since the imposition of even the maximum sentence would not have contravened that amendment. At most, an erroneous evidentiary ruling will have been made, and, of course, the Constitution does not exist to cure every such mistake.

In capital cases, though, the situation is altogether different. A death sentence based on irrelevant, prejudicial information always invokes the Eighth Amendment because of the risk that death is being imposed for the wrong reasons. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985) (death sentence reversed because of risk that jury believed it was not making final determination); *Gardner v. Florida*, 430 U.S. 349, 364 (1977) (White, J., concurring) (reversing death sentence imposed after sentencing judge considered confidential information not provided to defendant). Given death's finality, a death sentence imposed for impermissible reasons, or in spite

nal Justice Practitioners and Victims, 1989 A.B.A. Sec. Crim. Just. 71. After this, however, judges find that victim impact statements are most helpful in imposing restitution. *Id.* Hillenbrand and Smith thus conclude that the most dramatic consequence of using victim impact statements in non-capital cases is its effect on restitution. *Id.* at 71, 103, 123. "Clearly, the greatest impact from the judges' perspective relates to restitution—both the number of orders issued and the size of those orders." *Id.* at 71.

of factors that may call for a less severe penalty, is, by definition, disproportionate. *See id.; Lockett v. Ohio*, 438 U.S. 586, 605; *Eddings v. Oklahoma*, 455 U.S. at 119 (O'Connor, J., concurring). A death sentence based on irrelevant prejudicial information thus cannot be tolerated under the Eighth Amendment, even though a sentence based on irrelevant evidence in a non-capital case very rarely invokes that amendment.

C. The use of unforeseeable victim impact information in a capital sentencing trial cannot be justified on the grounds that it is relevant to rebut mitigating evidence offered by the defendant.

The capital sentencer must focus on the offender's state of mind, character, and propensity for future dangerousness. Mitigating evidence on these particular aspects is relevant to the sentencing determination, because it aids the decision on whether the offender should live or die.

It has been stated that, since the defendant may introduce all available, relevant [10] mitigating evidence, unforeseeable victim impact information is relevant to counter the defendant's proof. *Booth v. Maryland*, 482 U.S. at 517 (White, J., dissenting); *id.* at 520 (Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. at 820-21 (O'Connor, J., dissenting); *Tennessee v. Payne*, 791 S.W.2d at 19. There is, however, no symmetry between these two categories of evidence. The former bears directly on whether the offender's state of mind, character, and propensity for future dangerousness warrant execu-

[10] We believe that the Constitution permits a state to limit the type of "mitigating" evidence that a defendant may offer in a capital sentencing trial. If the mitigating evidence does not assist the decision on whether the defendant's state of mind, character, or propensity for future dangerousness warrants execution, it may be excluded as irrelevant. *Cf. Lockett v. Ohio*, 438 U.S. at 608 ("To meet constitutional requirements, a death penalty statute must not preclude consideration of *relevant* mitigating factors") (emphasis added).

tion. The latter merely reveals the unforeseeable consequences of the offense.

Far from having its "hands tied", the prosecution may counter the defendant's mitigating evidence through the cross-examination of defense witnesses, the introduction of its own proof bearing on relevant factors, and the use of appropriate arguments. Rather than constituting an attempt to rebut the offender's mitigating evidence, the use of unforeseeable victim impact information is an effort to inject into the capital sentencing trial altogether different factors that do not prove the offender's state of mind, character, or future dangerousness.

V. THE STATE'S USE OF VICTIM IMPACT EVIDENCE DID NOT CONSTITUTE HARMLESS ERROR.

In order to show that the constitutional error involved here was harmless, the State must demonstrate that the use of the *Booth*-prohibited evidence and arguments was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). The Tennessee Supreme Court erroneously concluded that the State has met this burden.

The crimes in this case were, of course, brutal and shocking. Apart from that fact, however, the State had nothing to support the imposition of death other than the *Booth*-violative victim impact information, the gruesome color video tape that even the trial judge intimated was too inflammatory to introduce during the guilt phase (T. 1493-94), and the theatrics with which the prosecution improperly concluded its final argument. *See Tennessee v. Payne*, 791 S.W.2d at 20 (J.A. 45).

Payne is not the typical "two time loser" who cold bloodedly executed a robbery victim. He was, at the time of these crimes, a twenty year old mentally handicapped laborer, with no prior record. He was described at trial by a clinical psychologist as one of the most polite prison-

ers he had ever interviewed (T. 1530). The State did not introduce any evidence of disciplinary problems or academic misconduct. Nor did it seek to show any clinical evaluation or otherwise attempt to demonstrate any propensity for future dangerousness. The only explanation for these horrible killings consistent with the jury's findings is that Payne "snapped" under the influence of injected cocaine.

Payne was tried under a statute,[11] and pursuant to jury instructions (J.A. 21,22), that required him, in order to save his life, to convince the jury that the mitigating evidence outweighed the aggravating circumstances. The State relied heavily on the *Booth*-condemned evidence and arguments to overcome Payne's mitigating evidence. This, of course, made his burden especially onerous. The erroneous use of this information was not harmless beyond a reasonable doubt.

CONCLUSION

For the reasons stated herein, Petitioner respectfully submits that the Court's decisions in *Booth* and *Gathers* should not be overruled; that the Court should determine that the State's use of unforeseeable victim impact information violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution; that his death sentence should be set aside; and that this case should be remanded for proceedings not inconsistent with the Court's judgment.

Respectfully submitted,

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[11] *See, supra* note 1.